TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 123.

GEORGE FERGUSON, PLAINTIFF IN ERROR,

vs.

CHARLES McLAUGHLIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 16, 1875.

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Due service of a copy of the within transcript hereby admitted, after having been certified to, this 13th day of January, 1875.

J. A. MOULTRIE,
Attorney for Respondent.

In the supreme court of the State of California.

CHARLES MCLAUGHLIN, PLAINTIFF AND RESPONDENT,
vs.
GEORGE FERGUSON, DEFENDANT AND APPELLANT. } No. 4594.

TRANSCRIPT ON APPEAL.

Filed January 30, 1875.

GRANT I. TAGGART, *Clerk.*

In the supreme court of the State of California.

Complaint.

In the district court of the twentieth judicial district of the State of California, in and for the county of Santa Clara.

CHARLES MCLAUGHLIN, PLAINTIFF,
vs.
GEORGE FERGUSON, DEFENDANT.

The above-named plaintiff complains of the above-named defendant, and for cause of action avers:

That on the 24th day of April, A. D. 1873, said plaintiff was, ever since has been, and now is the owner in fee-simple and entitled
2 to the possession of all that certain piece, parcel, or tract of land situate, lying, and being in the county of Santa Clara and State of California, known, bounded, and described as follows, viz:

Lot (4) four of section number thirty-five (35) in township number six (6) south, of range number one (1) west, Mount Diablo base and meridian, containing twenty-two $\frac{79}{100}$ (22 $\frac{79}{100}$) acres, according to the United States surveys.

That afterwards, to wit, on the said 24th day of April, A. D. 1873, said defendant entered into and took possession of the whole of said premises, and now unlawfully and wrongfully withholds the possession thereof from plaintiff, to his damage in the sum of one thousand dollars.

That the value of the rents and profits of said land per acre is fifteen dollars per year.

Wherefore plaintiff prays judgment against said defendant for the possession of the land and premises above described, and for one thousand dollars for the unlawful and wrongful withholding of the same, and for three hundred and thirty-seven $\frac{50}{100}$ dollars for the value of the rents, issues, and profits thereof, and for costs in this behalf expended.

J. A. MOULTRIE,
Attorney for Plaintiff.

(Endorsed:) Filed June 12th, 1873. C. Finley, clerk, by Ed. Pomeroy, deputy.

3 *Demurrer.*

(Title of court and cause.)

Now comes said defendant, who is sued herein under the name of George Ferguson, and demurs to the complaint herein on the ground that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays that said complaint be dismissed, and that he have his costs in this behalf expended.

YOELL & STEPHENS,
Defendant's Attorneys.

(Endorsed:) Filed June 20th, 1873. C. Finley, clerk, by Ed. Pomeroy, clerk.

Order overruling demurrer.

(Title of court and cause.)

In open court, September 10th, 1873.

Present, the Hon. D. Belden, judge of the twentieth judicial district.

Comes now the counsel for the plaintiff, and, after argument had, submits the demurrer to the complaint to the court for decision, and the court being fully advised,

It is ordered that said demurrer be overruled, and, further, that defendant have ten days to answer.

4 (Endorsed:) Filed Sept. 29, 1873. C. Finley, clerk, by M. H. Gay, deputy clerk.

Defendant's amended answer and cross-complaint.

(Title of court and cause.)

I.

Now comes George Ferguson, the above-named defendant, and, by leave of the court first duly had and obtained, files this his amended answer and cross-complaint in the above-entitled action, and for answer specifically denies that the said plaintiff was on the 24th day of April, 1873, or at any other time, or that he is now, the owner in fee-simple or otherwise possessed or entitled to the possession of the tract of land described and mentioned in said complaint, to wit, lot four of section number thirty-five in township number six south, of range number one west of Mount Diablo meridian.

And defendant further denies that this defendant did on the said 24th day of April, 1873, or at any other time, wrongfully entered into possession of said lot, or ever since, or now does, wrongfully, or at all, withhold the possession thereof from plaintiff, to his damage or otherwise in the sum of one thousand dollars, or to his damage in any other sum of money whatever, and denies that the value of the
5 rents and profits of said land per acre is fifteen dollars per annum, or any other sum of money whatever.

Wherefore said defendant prays to be hence dismissed with his costs.

And for a cross-complaint in equity, and for the purpose of obtaining equitable relief herein against the said plaintiff, this defendant avers and alleges:

I.

That the plaintiff in this cross-complaint in equity now is, and always has been since the tenth day of May, 1858, and for a long time prior thereto, a citizen of the United States, and the head of a family.

II.

That on or about the said tenth day of May, 1858, this plaintiff settled upon said lot, with other lands contiguous thereto and adjoining the same, to wit, upon lot three and said lot four, and upon the east half of the southwest quarter of said section thirty-five, in township six south, of range one west of the Mount Diablo meridian; and upon lot one, in section two, in township seven south, of range one west of said meridian, containing and embracing not exceeding one hundred and sixty acres, to wit, one hundred and fifty-five acres or thereabouts, under the pre-emption laws of the United States, to wit, the act of Congress approved September 4th, 1841, entitled "An act to appropriate the
6 proceeds of the sales of the public land and to grant pre-emption rights," and the act of Congress approved March 3d, 1853, entitled "An act to provide for the survey of public land in California, the granting of pre-emption rights therein, and for other purposes."

III.

And the plaintiff further says, states, and alleges that upon the passage over and approval of the act of Congress approved May thirtieth, (30th,) 1862, entitled "An act to reduce the expenses of the survey and sale of the public lands in the United States," the plaintiff made a new settlement upon said land, in pursuance of said act of Congress last mentioned, and erected a dwelling-house and other improvements upon said land, and cultivated the same annually ever since under the provisions of said acts.

IV.

That at the time of said plaintiff's last settlement upon said land as aforesaid, to wit, on the said 30th day of May, 1862, the said land was unsurveyed public land of the United States, subject to settlement, occupation, and pre-emption under said laws.

V.

And plaintiff avers that the said plaintiff did not leave land of his own to settle upon said land. That plaintiff was not at the time
7 of his said settlement upon said land, at the times aforesaid, or at any time since then, the owner of three hundred and twenty acres of land in any State or Territory of the United States.

That plaintiff never had any other right of pre-emption or homestead right to any other land in the State of California or elsewhere.

That said land was at the time of plaintiff's said settlement thereon, and at all times since then, and it is yet, agricultural land, and not mineral land of any kind whatever.

That plaintiff never made any agreement or contract, in any way or manner whatever, by which the title which he may acquire from the Government of the United States should enure in whole or in part to the benefit of any other person or persons except himself. That the said plaintiff did not settle upon said land for speculative purposes to sell the same, but in good faith to appropriate the same to his own exclusive use and benefit, under the provisions of said laws.

VI.

And the plaintiff further says that after the plaintiff's said settlement upon said land as aforesaid, to wit, on the 19th day of May, 1866, the official township plat of the official survey of township six south, of range one west of the Mount Diablo meridian, and afterward, on or about the 7th day of October, 1866, that portion of township plat of the official survey of township seven south, of range one west of said
8 meridian as embraced that portion of the land so occupied by plaintiff therein were duly and officially filed in the proper United States land-office for the district wherein said land was and yet is situated, to wit, in the United States land-office at San Francisco, California.

VII.

That the said tracts of land so settled upon by the said plaintiff were at the time of his said settlement thereon, and yet are, situated in both of said townships.

VIII.

That on the fifth day of June, 1866, and on the fourth day of October, 1866, plaintiff duly filed in said land-office, with the register thereof, this plaintiff's declaratory statements, in writing, as required by said laws, and by the rules and regulations prescribed and promulgated by the Commissioner of the General Land-Office, of plaintiff's intention to claim said tracts of land under said laws, including said lot four in said McLaughlin's complaint mentioned.

IX.

And the plaintiff further says that at different times between the first day of December, 1866, and the first day of May, 1867, this plaintiff, in pursuance of his said settlement upon said tracts and lots of land, and in the pursuance of the provisions of said laws and said rules and regulations, presented due and full proof of plaintiff's said right of
9 pre-emption in and to said several tracts, lots, and parcels of land to the register and receiver of said land-office, and then and there duly subscribed the affidavit required by said laws and rules, and then filed the same with said register and receiver, and then and there tendered the full purchase-price of said several tracts, parcels, and lots of land to the receiver of said office for and to the use of the United States, and then and there, between said dates, to wit, on the first day of December, 1866, and the first day of May, 1867, this plaintiff duly tendered himself ready and willing, and plaintiff has been at all times since then ready and willing, and he is yet ready and willing, to comply in all things with the requirements of said laws and said rules and regulations in order to complete and perfect his, said plaintiff's, right of pre-emption in and to all of said tracts, parcels, and lots of land so settled upon and claimed by plaintiff as aforesaid.

X.

That the said register and receiver, upon said evidence and proof so presented and produced before them by plaintiff as aforesaid, decided and gave their joint opinion that the plaintiff was a qualified pre-emptor in all things; but, wrongfully and contrary to the legal and just rights of this plaintiff, rejected the said claim of this plaintiff to said lot four, upon the sole and exclusive grounds and reason that plaintiff's dwelling-house was not upon the land so claimed, occupied, and possessed by him situated in said section thirty-five, in said township six, but was upon said lot one, in said section, in said township seven.

XI.

And the plaintiff further says that he, this plaintiff, duly appealed from the said action, decision, and opinion of the said register and receiver to the Commissioner of the General Land-Office; that the said Commissioner, on said appeal, wrongfully, and contrary to the legal and just rights of the plaintiff, gave his opinion and decided in the same way as the said register and receiver had done, and precisely upon the same grounds; that this plaintiff duly appealed to the Secretary of the Interior from the said decision and opinion of the said Commissioner, and the said Secretary, on said appeal, wrongfully, and contrary to the rights of this plaintiff, gave his opinion and decision in the same way and to the same effect as the said register and receiver and Commissioner had done, and thereby finally rejected the claim of the plaintiff to said lot four upon the same grounds and for the same reasons, and no other, that the said register and receiver and Commissioner had done.

XII.

And this plaintiff further alleges that the defendant in this cross-complaint, to wit; the said Charles McLaughlin, some time in the latter part of the year 1866, presented, on behalf of the Western Pacific
11 Railroad Company, a corporation then existing under the laws of the State of California, as the president thereof, the claim of said company to said lot four, to said register and receiver, and they, the said register and receiver, upon the rejection of this plaintiff's claim to said lot, wrongfully, and without any right thereto whatever, awarded the same to said railroad company; and the said Commissioner and Secretary wrongfully, and without any right whatever, done in like manner as said register and receiver done, awarded said lot to said company

XIII.

And this said plaintiff further alleges that the claim to said lot so presented by said company and said McLaughlin was entirely fraudulent, sham, and unfounded, for the reason that no grant was ever made of said lot by the United States to said company, or any other company, or to said McLaughlin, although the said company and said McLaughlin alleged and pretended to said register and receiver, Commissioner and Secretary, at the different times they presented their said claim to said lot, that the same was granted to the Central Pacific Railroad Company of California, a corporation then existing under the laws of said State by the United States, under and by virtue of the provisions of the act of Congress approved July 1st, 1862, entitled "An act to aid in the con-

struction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the
12 same for postal, military, and other purposes;" and under the provisions of the act of Congress approved July 2d, 1864, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes;'" and by an assignment from the Central Pacific Railroad Company to said Western Pacific Railroad Company, alleged by said companies to have been made in the month of December, 1864; and by the provisions of the act of Congress approved March 30th, 1865, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,'" approved July the 1st, 1862; and to amend an act amendatory thereof, approved July second, 1864, to the said Western Pacific Railroad Company, when, in truth and fact, the said McLaughlin as such officer, and the said Western Pacific Railroad Company, well knew, at all times, that the said lot never was granted by said acts, or any other acts or laws whatever, to said Central Pacific Railroad Company, or to said Western Pacific Railroad Company, or to any other company, corporation, or individual whatever.

XIV.

And this plaintiff further alleges that the Commissioner of the
13 General Land-Office, under the said false representations made by the said McLaughlin and the said Western Pacific Railroad Company, as aforesaid, issued to the said Western Pacific Railroad Company letters-patent of the United States for said lot four, to wit, on or about the 24th day of December, 1872; and alleges that, whatever right, title, or interest the said McLaughlin now has, or claims to have, or ever had in or to said lot four was acquired by him with the full knowledge of the claim, right, title, and interest of this plaintiff thereto, and of the fraudulent nature and character of the claim to said lot set up thereto by the said Central and Western Pacific Railroad Companies; that this plaintiff would have obtained letters-patent of the United States for said lot four but for the said fraudulent acts of the said McLaughlin and said ompanies, so made as aforesaid to the register and receiver, Commissioner and Secretary; that such patent would have been obtained by this plaintiff for the sum of one dollar and twenty-five cents per acre in the lawful money of the United States. That said lot contains, according to the official survey thereof, twenty-two acres and seventy-nine one-hundredths of an acre; that to obtain said patent for said lot the said McLaughlin or the said companies did not pay any sum of money whatever.

That this plaintiff has no other adequate or speedy remedy at law whereby to obtain relief herein.

That whatever right, title, or interest the said Central Pacific
14 Railroad Company and the said Western Pacific Railroad Company ever had, or ever claimed to have, in or to said lot four, they and each of them conveyed such right, title, and interest to the said McLaughlin prior to the commencement of this action.

Wherefore this plaintiff prays judgment, order, and decree of this honorable court—

First. That the said Charles McLaughlin, the defendant in this cross-complaint, may be ordered, adjudged, and decreed to have obtained the legal title to said lot four, in trust for this said plaintiff; and that he, the said McLaughlin, may be ordered, adjudged, and decreed to convey said legal title of said lot to this plaintiff, free and clear of and from all incumbrances; and that upon his refusal to do so, by a good and valid deed of conveyance, that the clerk of this court may be appointed a commissioner to do so, in the name of him, the said McLaughlin, upon his receiving his proper fees, costs, and charges therefor; and upon this plaintiff paying in to him, the Treasury of the United States, or tendering the same to the proper receiver of the land-office for the district wherein said lot is situated, the purchase-price of said lot at the sum of one dollar and twenty-five cents per acre. And that he, the said McLaughlin, and all persons claiming under or through him, may forever be enjoined and restrained by said order, judgment, and decree from ever asserting in any court or place any right, title, or interest in or to said lot, or to any part thereof; and this plaintiff prays for such
15 other and further relief herein as to equity appertains and belongs, and as to this honorable court may seem meet and proper to give, and this plaintiff will ever pray.

B. B. NEWMAN,
Defendant's Attorney and Attorney for the Plaintiff in the foregoing cross-complaint.

STATE OF CALIFORNIA,
County of Santa Clara, ss:

George Ferguson, being duly sworn, deposes and says that he is the plaintiff in the foregoing cross-complaint; that he has read the said cross-complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and that as to those matters that he believes it to be true.

GEO. FERGUSON.

Subscribed and sworn to before me this 13th day of April, 1874.
[SEAL.] M. S. WILSON,
Notary Public.

(Endorsed:) Due service of a copy of the within-amended answer and cross-complaint hereby admitted this 13th day of April, 1874.
J. A. MOULTRIE,
Attorney for Plaintiff.

Filed April 13th, 1874.

16 *Findings.*

(Title of court and cause.)

This cause came on regularly to be tried before the court sitting without a jury—a jury having been waived by the respective parties—and it appearing from the pleadings in said cause that the defendant in his cross-bill sought equitable relief against the plaintiff, to wit, that any legal title that might be found by the court to be in the plaintiff it might be adjudged was by plaintiff held in trust for said defendant, and it appearing to the court proper that said equitable defence be first

tried, and the parties consenting thereto, the said equitable defence was first tried in said action; and the proofs in support thereof show that the said defendant, George Ferguson, bought the possessory right and improvements of two persons, named, respectively, J. H. King and John P. Paschal.

That said purchase was of two several and distinct parcels of land, held and claimed in severalty by said parties; that said purchase was made in the month of February, 1858, and that said two tracts thus purchased aggregated about 158 acres.

That said Ferguson paid for said two parcels about $2,800. That said parcels were enclosed by separate fences, but were contiguous tracts; that in May, 1858, Ferguson entered into the occupancy of the land in question, and resided with his family upon one of said tracts, and has ever since so continued to reside; said tracts of land have been always enclosed by substantial fences. That said Ferguson has con-
17 tinuously farmed said land, cultivating and pasturing the whole thereof, since said year 1858 and up to the present time. That his improvements are of a permanent character, and have been at all times of the value of $2,000, gold coin.

That the said Ferguson was at the time of his entry upon said land, in 1858, and ever since has been a citizen of the United States, over twenty-one years of age, and the head of a family. That said Ferguson did not leave land of his own at any time to settle upon said land; that he never had or claimed any other right to a pre-emption or homestead-claim within the State of California or elsewhere.

That said land, and the whole thereof, is agricultural land, and there are neither mines nor salines upon the same. That said defendant Ferguson made no agreement or contract of any character whatever with any person by which the title he proposed to secure and obtain from the United States Government should enure, in whole or in part, to any person other than the said Ferguson himself. That after the purchase and entry by said Ferguson upon said land, as above set forth, he claimed and proposed holding the same under the pre-emption laws of the United States, and has so continued to hold and claim to the present time.

That at the time of the entry and settlement of defendant upon said tract, in 1858, the same was unsurveyed public land of the United States.

18 That in 1852 the county court of the county of Santa Clara duly incorporated the town of Santa Clara; and afterwards, on the 3d day of April, 1856, the legislature of the State of California duly confirmed and legalized said proceedings of said county court. That all of the land so entered upon by said Ferguson in 1858 was situated outside the corporate limits of said town of Santa Clara as the same was then established.

IX.

That on the 31st day of March, 1866, the legislature of the State of California, without any solicitation on the part of the defendant, enlarged and re-incorporated the said town of Santa Clara. That the extensions of the said corporate limits of said town included and embraced about thirty acres of said land, which said thirty acres included and embraced the dwelling-house of the said defendant upon said 158 acres.

X.

That on the 19th day of May, 1866, the township plat of the Government survey of township six south, of range one west, of the Mount Diablo meridian was duly filed in the proper United States land-office, to wit, at San Francisco, California. That the lot of land in controversy in this case is situated outside of the said corporate limits of the town of Santa Clara as re-incorporated on the 31st day of March, 1866.

XI.

19 That on the 5th day of June, 1866, the said defendant duly filed his declaratory statement with the proper register of said land-office, as set forth in his answer and amended answer, wherein he claimed the lot in controversy, with other land, amounting in all to 144 67/100 acres. That all the land so in possession of defendant, situated within the said corporate limits of the town of Santa Clara, was situated in township seven south, of range one west, of said meridian. That said township seven was duly filed in said land-office on the 7th day of October, 1866; and the said defendant duly requested the said register to allow him to amend the declaratory statement already filed by him for said land in township six, but said register refused to allow him to do so, but directed him to file a separate declaratory statement for said land so embraced within said town limits, which defendant done under protest.

XII.

That on the 1st day of March, 1867, the Congress of the United States duly relinquished and granted to the corporate authorities of the town of Santa Clara, according to the lines thereof, as incorporated last aforesaid, all the right, title, and interest of the United States in and to the lands within said corporation, in trust, to be disposed of and conveyed to the parties in the bona-fide actual possession thereof, by themselves or their tenants, on the passage of said act.

20 That the said corporate authorities duly conveyed to said defendant, on the 20th day of December, 1867, all the lands so occupied and possessed by him, situated within said corporate limits, in pursuance of said act of Congress.

XIII.

That in pursuance of the act of Congress of May 30th, 1862, the defendant made a new settlement upon said 158 acres, authorizing settlements to be made, under the pre-emption laws of the United States, upon unsurveyed lands in California immediately after the passage of said act.

XIV.

That in the month of December, 1866, and from time to time thereafter, the defendant presented proof of his right of pre-emption to the lot in controversy, including the other land claimed by him, in township six south, range one west, embraced in his declaratory statement first filed by him with said register. And the plaintiff also, on behalf of the Western Pacific Railroad Company, presented evidence in its behalf, under the laws of Congress of July 1st, 1862, July 2d, 1864, and March 3d, 1865, granting to the Central and Western Pacific Railroad Com-

panies the odd-numbered sections of public land for the purpose of aiding in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean; and, upon such contest being had before the register and receiver, the said officers decided against the said
21 defendant, and then and there awarded the lot in dispute to the said Western Pacific Railroad Company, under the said acts of Congress; that said defendant duly appealed to the Commissioner of the General Land-Office from said decision of the register and receiver; and the said Commissioner, and afterward the Secretary, upon appeal to him by said defendant, decided in like manner as said register and receiver had done; and thereafter, on the 24th day of December, 1872, a patent of the United States was duly issued to the said Western Pacific Railroad Company; and afterward all the right, title, and interest of said Western Pacific Railroad Company was duly transferred to plaintiff prior to the commencement of this action.

That the land in question was, until the issuance of the patent of the United States to the plaintiff's grantor, part of the public domain of the United States, and was within an odd section, as designated in the several acts of Congress donating lands to the Western Pacific R. R. Co.

That there was had, after the month of March, 1865, before the register and receiver of the United States land-office at San Francisco, a contest between the Western Pacific R. R. Co. and this defendant Ferguson as to the right to the premises in controversy; that said contest was taken by appeal from said register and receiver to the Commissioner of the General Land-Office, and from the said Commissioner to the Secretary of the Interior; that in each and all of said offices and before each and all of said officers it was found and decided that
22 said demanded premises should be awarded to said Western Pacific R. R. Co., the grantor of plaintiff.

That by said Commissioner of the General Land-Office it was found and decided that said premises in controversy were within the corporate limits of the town of Santa Clara, but that no portion of the said premises, or of the quarter-section of which they were a part, were ever subdivided into lots or blocks, or used for town purposes, but that the same was used for agricultural and gardening purposes. It was by said Commissioner further found and decided that the residence and all the valuable improvements of said Ferguson were in township 7 S., R. 1 W., and within the corporate limits of the town of Santa Clara. It was further found and decided by said Commissioner that said Ferguson, after filing upon said land, had sold and disposed of a portion of said tract thus filed upon, conveying to those parties named smaller portions than a recognized legal subdivision. "The Commissioner therefore finds that Ferguson cannot be regarded as a bona-fide settler on the public lands prior to the withdrawal, and awards said land to the Western Pacific R. R. Co."

From this decision an appeal was taken by Ferguson to the Secretary of the Interior, and the judgment of the Commissioner was affirmed by the Secretary.

Besides the facts above set forth and recited as found by said Commissioner, said Commissioner as to the claim of said Ferguson did further find and decide:

23 "That George Ferguson filed his declaratory statement, No. 2792, June 5th, 1866, on the E. ½ of S. W. quarter, and on lots 3 and 4 in S. E. quarter of section 35, T. 6 S., R. 1 W., alleging settlement March 10th, 1858. He further finds that Ferguson purchased the pos-

sessory right to the whole or a portion of the S. W. quarter of sec. 35 in the year 1855."

The foregoing propositions contain all the matters and facts that it is here shown were established before the U. S. land officers. Beyond these propositions it does not appear what other matters were admitted, contested, or found and decided by any of said several tribunals.

That at the date of the filing of this complaint, June 12th, 1873, and from the 24th of April, 1873, the defendant has been in the possession of the premises described in plaintiff's complaint, and during all that time has, and ever since has, and still does withhold the same from this plaintiff.

That the premises thus withheld by defendant amount to twenty-two $\frac{19}{100}$ acres. That the value of the use and occupation of the same, and of the rents and profits, is ten dollars per acre per annum, and the whole value of the rents or profits of the whole of said tract for the whole of said time is two hundred and twenty dollars, ($220.00,) in gold coin.

That on the 2d day of July, 1862, the Congress of the United States granted to the Central Pacific Railroad Company of California
24 every alternate section of public land, designated by odd numbers, within five miles of the line of said road, upon the definite location thereof. That in pursuance of said act of Congress the said company located its westerly terminus in the city of Sacramento on the 15th of November, 1862, and afterwards, on the 15th day of December, 1864, assigned all its rights under said act and the subsequent act of Congress of July 2d, 1864, to the Western Pacific Railroad Company, and such assignment was recognized by Congress on the 3d day of March, 1865. That the lot in dispute and in controversy is situated within five miles of the line of said line of the Western Pacific Railroad Company, and that the line of said road of said last-named company was definitely located on the 30th of January, 1865. That said Western Pacific Railroad Company duly conveyed all its right, title, and interest in and to the lot in controversy to the plaintiff prior to the commencement of this action.

II.

I find from the evidence offered by the defendant and received by the court the same facts as found by me upon the equitable defence set up by the defendant, and they will be considered and held as the findings of fact also in this law side of the case, and as conclusions of law.

CONCLUSIONS OF LAW.

I.

25 That the defendant has shown no equities which entitle him to the relief sought in his cross-bill. Said cross-complaint is therefore dismissed.

II.

That plaintiff is entitled to judgment of restitution of the demanded premises, as prayed in his complaint, and $220.00 damages for use and occupation. Judgment accordingly, with costs of suit to plaintiff.

Judgment accordingly.

Twenty days' stay of proceedings.

D. BELDEN,
District Judge.

SAN JOSE, *July* 29, 1874.

(Endorsed:) Filed August 3d, 1874. C. Finley, clerk, by M. H. Gay, deputy.

Judgment.

(Title of court and cause.)

MAY TERM, A. D. 1874.

This cause came on regularly for trial, J. A. Moultrie, esq., appearing as counsel for the plaintiff, and B. B. Newman for the defendant. A trial by jury having been expressly waived by the counsel for the
26 respective parties, the cause was tried before the court, sitting without a jury; whereupon witnesses on the part of the plaintiff and defendant were sworn and examined, and the evidence being closed, the cause was submitted to the court for consideration and decision; and after due consideration thereon the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that the plaintiff, Charles McLaughlin, do have and recover of and from the defendant, George Ferguson, judgment of restitution of the premises described as follows, to wit: All that certain piece or tract of land situate, lying, and being in the county of Santa Clara and State of California known, bounded, and described as follows, viz: Lot (4) four of section number thirty-five (35) in township number six (6) south, of range number one (1) west, Mount Diablo base and meridian, containing twenty-two $\frac{79}{100}$ ($22\frac{79}{100}$) acres, according to the United States surveys.

It is further ordered that the cross-bill of the defendant be, and the same is hereby, dismissed.

It is further ordered that the plaintiff do have and recover from said defendant the sum of $220.00 damages for the use and occupation of said premises, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of two hundred forty $\frac{61}{100}$ dollars.

27 Judgment rendered August 3d, A. D. 1874.

[SEAL.] C. FINLEY, *Clerk*,
By M. H. GAY, *Deputy Clerk*.

Order staying proceedings.

(Title of court and cause.)

The defendant in the above-entitled action having in good faith filed and served his notice of motion for a new trial in said action, it is hereby ordered that all proceedings in said action be stayed until and for ten days after notice by the party in whose favor said motion may be decided, to the other party, of the entry of the order of the court granting or refusing or denying a new trial in said action.

San José, September 7th, A. D. 1874.

D. BELDEN,
District Judge.

(Endorsed:) Filed September 7th, 1874.

Notice of motion for new trial.

(Title of court and cause.)

To the above-named plaintiff and J. A. Moultrie, esq., his attorney:

Please take notice that the defendant, George Ferguson, on the
28 24th day of September, A. D. 1874, at the court-room of said

court, in the court-house of the city of San Jose, county of Santa Clara, State of California, and at the hour of eleven o'clock a. m. of said day, or as soon thereafter as counsel can be heard, will move this court for a new trial in said cause.

Said motion will be made and based upon the following grounds and assignments of error, to wit:

First. Insufficiency of the evidence to justify the decision of the court, or the findings of the court, rendered and made in said action.

Second. That said decision is against the evidence and contrary to law.

Third. Errors in law occurring at the trial and duly excepted to by the defendant, to wit:

I. The court erred in sustaining the plaintiff's demurrer to the defendant's cross-complaint.

II. The court erred in admitting in evidence the letters-patent to the Central Pacific Railroad Company, offered in evidence by the plaintiff, as the evidence before the court at the time said offer was made on the part of the defendant in support of his equitable defence to this action clearly showed and established the facts that defendant was a qualified pre-emptor upon and claimant of the land in dispute in this case at all times since and including the first day of July, 1862, to the present time, and that said premises, being so claimed and possessed by
29 said defendant during all of said period as a pre-emptor, and he having performed all the conditions required by the pre-emption laws on his part, the said land was not granted or intended to be granted, but expressly reserved from grant, by the Congress of the United States, to the said Central Pacific Railroad Company, by the act of Congress of July 1st, 1862, entitled "An act to aid the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure the use of the same to the Government for postal, military, and other purposes," or by the acts amendatory thereof, or by any act whatever; hence the patent offered in evidence by plaintiff, purporting to be issued to said company under said act of July 1st, 1862, and the acts amendatory thereof, issued to said company without authority of said act, or any other act or law whatever, and is void and of no force and effect, and should not be admitted in evidence by the court.

The evidence is insufficient to sustain the findings of the court in this, that the evidence shows that the defendant is, and always has been since the year 1858, a resident upon the land claimed and occupied by him, under the pre-emption laws of the United States, not exceeding 160 acres, of which the lot in dispute was and is a part thereof; and that at all times since the said year 1858 the defendant resided upon the said land so claimed by him with his family, and cultivated and improved the same continuously since the year 1858 up to the
30 present time, during all of which time the defendant done and performed in due time every act and thing required of him to be done and performed by the said pre-emption laws of the United States, in order and in pursuance of his said settlement on said land to perfect his right of pre-emption thereto, and obtain his title thereto under said pre-emption laws, he having in all things the full qualification of a pre-emptor upon said land during the whole of said period; hence the decision and findings are against law and the evidence.

Said motion will be made upon statement of the case, to be prepared and filed herein as required by law; upon said motion reference will

also be made to the pleadings, orders of the court on file, and records of the court.

Respectfully,

B. B. NEWMAN,
Attorney for Defendant.

SAN JOSÉ, CAL., *September 7th*, 1874.

Affidavit of service.

STATE OF CALIFORNIA,
County of Santa Clara, ss:

C. C. Stephens, being duly sworn, says that he is a citizen of this State and of the United States; over the age of 21 years; is competent to testify in all the matters of the case of Charles McLaughlin
31 vs. George Ferguson, twentieth district court, Santa Clara County, and that he is not a party to this action; that on the 7th day of September, A. D. 1874, at 8.45 o'clock a. m., at the law office of J. A. Moultrie, in the city of San José, said county of Santa Clara, affiant served the annexed notice of motion for new trial on said Moultrie by affiant at said time and place, delivering to and leaving with said Moultrie, personally, a true copy of said annexed notice.

September 7th, 1874.

C. C. STEPHENS.

Subscribed and sworn to before me this 7th day of September, A. D. 1874.

C. FINLEY, *Clerk.*

(Endorsed:) Notice of motion and affidavit. Filed September 7th, 1874.

Order extending time to file statement.

(Title of court and cause.)

Upon good cause shown, it is hereby ordered that the defendant in the above-entitled action may have ten days' additional time to prepare and file his proposed statement on motion for a new trial in the above-entitled action.

San José, September 28th, 1874.

D. BELDEN,
District Judge.

32 (Endorsed:) Filed September 28th, 1874.

Notice of motion for new trial.

(Title of court and cause.)

To the above-named plaintiff and J. A. Moultrie, esq., his attorney:

Please take notice that the defendant, George Ferguson, will, on the 15th day of October, A. D. 1874, at the court-room of said court, in the court-house in the city of San José, county of Santa Clara, State of California, at the hour of eleven o'clock in the forenoon of said day, or as soon thereafter as counsel for said defendant can be heard, will move

said court for a new trial in said action. Said motion will be made and based upon the following grounds and assignments of error, to wit:

First. Insufficiency of the evidence to justify the decision or findings of the court rendered and made in said action.

Second. That said decision and findings are against the evidence and contrary to law.

Third. Errors in law occurring at the trial and duly excepted to by the defendant, to wit:

1. The court erred in sustaining the plaintiff's demurrer to the defendant's cross-complaint.

33 11. The court erred in admitting in evidence the letters-patent to the Central Pacific Railroad Company, offered in evidence by the plaintiff, as the evidence offered and received by the court on the part of the defendant at the time said offer was made in support of said defendant's equitable defence to this action clearly showed and established the fact that the defendant was a qualified pre-emptor upon and claimant of the land in dispute in this case at all times since and including the first day of July, A. D. 1862, to the present time; and that the said premises being so claimed and possessed by said defendant during all of said period as a pre-emptor, and he having performed all the conditions required by the pre-emption laws on his part, the said land was not granted, but expressly reserved from grant by the Congress of the United States to the said Central Pacific Railroad Company by the act of Congress of July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," or by the *the* acts amendatory thereof, or by any act whatever; hence the patent offered in evidence by the plaintiff purporting to be issued to the said company under said act of July 1st, 1862, and the acts amendatory thereof, issued to said company without authority of said act, or other act or laws whatever, and is void and of no force or effect; and therefore should not be admitted in evidence in this case by the court.

34 The evidence is insufficient to sustain the said decision or said findings of the court in this, that the evidence shows that the defendant is and always has been since the year 1858 continuously a resident upon the land claimed and occupied by him under the pre-emption laws of the United States, not exceeding one hundred and sixty acres, of which the lot in dispute was and is a part thereof; and that at all times since the said year 1858 the defendant resided upon the said land so claimed and occupied by him with his family, and cultivated and improved the same continuously since the said year 1858 up to the present time; during all of which time the defendant done and performed in due time every act and thing required of him to be done and performed by the said pre-emption laws of the United States, in order and in pursuance of his said settlement on said land to perfect his right of pre-emption thereto, and to obtain his title thereto under said pre-emption laws, he having in all things the full qualifications of a pre-emptor upon said land during the whole of said period; hence the decision and findings of the court are against law and the evidence in said particulars.

Said motion will be made upon a statement of the case to be prepared and filed herein as required and provided by law. Upon said motion reference will be made also to the pleadings, orders of court on file, and to the records and papers on file in said action.

Respectfully,

B. B. NEWMAN,
Attorney for Defendant.

35 (Endorsed:) Served on this 28th day of September, 1874, by handing Judge J. A. Moultrie a copy of the within notice.
B. B. NEWMAN.

Filed Sept. 28th, 1874.

Defendant's statement on motion for a new trial.

(Title of court and cause.)

Defendant's proposed statement on motion for a new trial in the above-entitled action:

This cause came on to be heard in its regular order on the calendar of this court, the parties being present in person and by counsel, J. A. Moultrie and Tully R. Wise, esq's, appearing as attorneys for the plaintiff, and B. B. Newman, esq., appearing as attorney for the defendant. And a jury having been expressly waived by the attorneys of the respective parties, the case was tried by the court without a jury, and upon the agreement of said attorneys, and consent of the court, the equitable defence of the defendant interposed in his answer was first heard, and tried by the court; and thereupon the said defendant, in support of his equitable answer, defence and cross-complaint herein, offered the following evidence, which was received by the court:

GEORGE FERGUSON, being duly sworn on his own behalf, in support of his equitable defence and cross-complaint, testified as follows:

36 I reside near the town of Santa Clara, in the county of Santa Clara, for the last seventeen years past continuously. I know the premises described in the complaint, and in dispute in this case. I have known them for 18 years last past. I bought these premises 18 years ago, and immediately after that time planted an orchard on it. I bought these premises from James L. King and John P. Pascal 18 years ago, and lived upon it ever since. I paid $3,800.00 for premises and the possession of it at that time, and then immediately went into possession of it with my family, and lived upon it ever since. The premises I bought from King and Pascal was about one hundred and fifty-eight acres, a part of which is the land in dispute in this case. King and Pascal made me a deed of these premises at that time; and I immediately, at that time, took possession of it with my family and have lived there ever since. The 158 acres was then well enclosed with post and board fences, and continued to be so ever since. I was at the time of my settlement on this land, in 1858, a citizen of the United States and the head of a family, and I have been so ever since. My family, at that time and ever since, consisted of my wife and four children, all of whom lived with me on this land ever since that time. I did not leave land of my own to settle on this land at any time. I never had any other right of pre-emption to any land except to these 158 acres. I made no agreement or contract at any time, with any person or persons whomsoever, by

37 which the title which I may acquire from the Government of the United States should enure, in whole or in part, to the benefit of any other person or persons except myself. This land is agricultural land, and always was, and not mineral land of any kind whatever. When I settled on this land, 1858, it all laid outside of the then corporate limits of the town of Santa Clara; and it was then, in 1858, unsurveyed public land; but afterwards, on the 19th day of May, 1866, a plat of township six south, of range one west, was duly filed in the United States land office for the district wherein the said land is and was then

situated; that is, in the United States land-office at San Francisco, California. I, after the filing of that township plat, filed my declaratory statement in the land-office, a certified copy of which was offered in evidence, and is in the words and figures following, to wit:

I, George Ferguson, of Santa Clara County, California, being the head of a family and a citizen of the United States, have since the 1st day of June, 1840, to wit, on the 10th day of March, A. D. 1858, settled and improved the E. ½ of SW. ¼, and lots 3 and 4 in southeast quarter of section 35, in township number six (6) south, of range number one (1) west, Mount Diablo meridian, in the district of lands subject to sale at the land-office at San Francisco, Cal., and containing one hundred and forty-four sixty-seven one hundredths acres; which land was not subject to private entry at the passage of the act of 4th September,
38 1841; and I do hereby give notice that I intend to claim said tract of land as a pre-emption right under the provisions of the act of Congress approved September 4th, 1841, and March 3d, 1853.

Given under my hand this 5th day of June, A. D. 1866.

GEORGE FERGUSON.

Signed in presence of—
B. B. NEWMAN.

Number 2792.

Declaratory statement of George Ferguson, Santa Clara County, Cal.

Lots 3 and 4, and E. ½ of SW. ¼ section No. 35, township No. 5 south, range No. 1 west, Mount Diablo meridian.

Filed June 5th, 1866.

JAMES SHANKLIN,
Register.

That afterwards, on the 7th day of October, 1866, the official plat of township seven south, of range one west, was duly filed in said land-office.

That, after the filing of said last-mentioned township plot in said land-office, to wit, on the 9th day of October, I duly filed in said land-office my amendatory declaratory statement, a duly-certified copy of which *are* in the words and figures as follows:

I, George Ferguson, of Santa Clara County, State of California, being a citizen of the United States, did on the 10th day of March, A.
39 D. 1858, settle upon that certain tract or lot of land, situated in the town of Santa Clara, in the State aforesaid, described on the official map of said town on file in the U. S. land-office in San Francisco as sublot one, containing $91\frac{22}{100}$ acres; not hereby abandoning any right that I may have by virtue of my pre-emption filing made on the 5th day of June, A. D. 1866, in United States land-office for the district, for the E. ½ of SW. ¼, and lots three and 4 in SE. ¼, section 35, T. 6, R. 1 W., Mount Diablo meridian, and have upon said lot substantial improvements, consisting of a dwelling-house, fences, barn, well, and small orchard, and all the land under cultivation; and I do declare that it is my intention to prove up and purchase the said tract or lot as a pre-emptor, according to the provisions of said act of Congress.

GEORGE FERGUSON.

Subscribed and sworn before me this 4th day of October, A. D. 1866.

JAMES SHANKLIN,
Register.

Town-lot declaratory statement, No. 650, town of Santa Clara:
George Ferguson, sublot No. 1.
Filed Oct. 4th, 1866.

J. W. SHANKLIN,
Register.

40 At the time I settled on this land I built a dwelling-house on it, and lived in it ever since with my family. I also cultivated all of the 158 acres ever since, in wheat and barley. This land was never offered at public sale by the Government of the United States, under the President's proclamation or otherwise.

It was here, at this stage of the trial, agreed and admitted between the attorneys of the respective parties that the following facts should be considered and held for the purposes of this case, as duly proved:

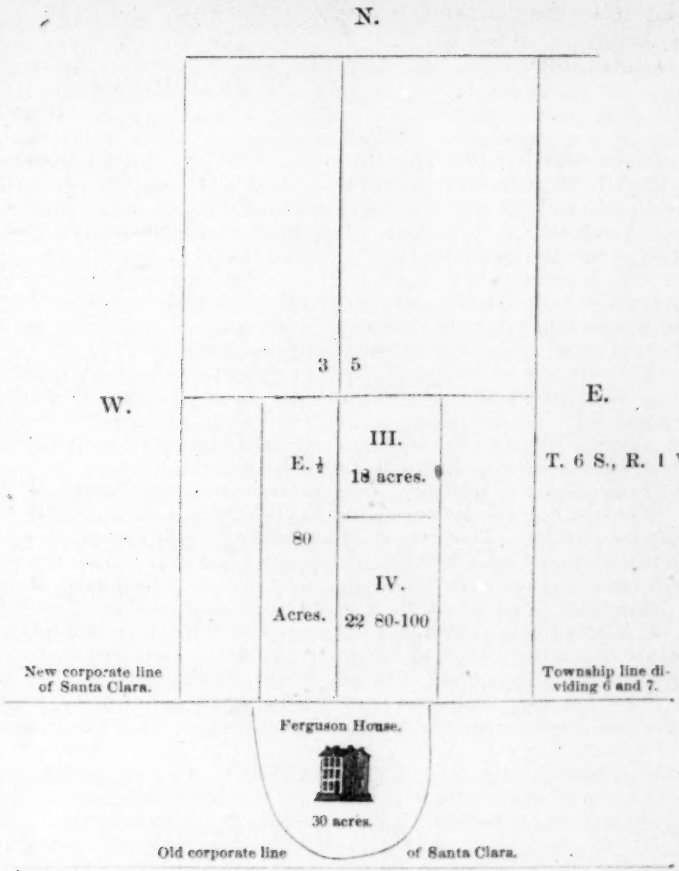
First. That the defendant, George Ferguson, in the year 1858, settled upon the land in controversy as a part of 158 acres of land claimed by him under the pre-emption laws of the United States, which was, at that time, unsurveyed public land, but became surveyed, as alleged in said defendant's answer and equitable cross-complaint herein.

Second. That said Ferguson was, in all things, a qualified pre-emptor under the laws of the United States, at the time of his said settlement on this land, and so continued to be *so* ever since.

Third. That said Ferguson duly filed his declaratory statement, as alleged in his equitable defence herein, at the time alleged therein, which was within the time allowed by law for him to do so.

41 Fourth. That Ferguson lived on said 158 acres with his family ever since the year 1858 up to the present time, and cultivated and improved the same under the pre emption laws of the United States.

Fifth. That the following is a correct diagram of the said 158 acres, and of the residence of said Ferguson thereon:



Sixth. That whatever right, title, or interest the plaintiff claims to the land in dispute, such right attached thereto, if any, on the 30th
42 day of January, A. D. 1865, and exclusively under the provisions of the act of Congress approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of same, the use thereof for postal, military, and other purposes."

Seventh. That if the said act of Congress granted the said land in dispute to the Central Pacific Railroad Company, under the above act, the same was withdrawn from pre-emption on the said 30th day of January, 1865, as said land was always within ten miles of the line of said road; but if not granted by said act of Congress, the patent offered in evidence by the plaintiff, issued to his grantor without any warrant, sanction, or authority of law, and is and always was null and void, and of no force or effect for any purpose whatever in this case. That before the commencement of this action, and before the issuance of the patent to the plaintiff's grantors, the defendant offered to make proof and payment for the whole of said 158 acres so settled upon by defendant to

the register and receiver of the proper land-office, but they refused to accept it.

It was also agreed by and between the attorneys of the respective parties that all the evidence given by defendant in support of and to maintain his equitable defence and equitable cross-complaint shall be held and considered as offered in support of and to sustain the
43 answer of the defendant herein to the plaintiff's complaint herein.

Eighth. That the 158 acres of land bought by said defendant from King and Pascal, in 1858, was situated outside of the then corporate limits of the town of Santa Clara, and so continued to be until the 31st day of March, 1866, when the legislature of the State of California re-incorporated said town, and so enlarged the same as to include the dwelling-house and about 30 acres of the said 158 acres so bought, claimed, and held by said Ferguson, on the south portion thereof, and that such re-incorporation was had and done without the procurement of said defendant, in any way.

Ninth. That the act of the legislature of the State of California entitled "An act to legalize the incorporation of the town of Santa Clara," approved April 3d, 1856, Statutes of 1856, at pages 58 and 59, shall be held and considered as a part of this statement, and may be read in all courts with the same force and effect as if incorporated herein.

Tenth. That the act of the legislature of the State of California entitled "An act to re-incorporate the town of Santa Clara," approved March 31st, 1866, statutes of 1866, page 493, shall be held and considered as a part of this statement, and may be read in all courts and places with the same full force and effect as if incorporated in this statement.

44 Eleventh. And that the act of Congress approved March 1st, 1867, United States Statutes at Large, vol. XIV, page 418, entitled "An act to quiet title to land in the towns of Santa Clara and Petaluma, in the State of California," so far as it applies to the town of Santa Clara, be held and considered as a part of this statement, and may be read in all courts and places with the same force and effect as if incorporated herein.

Twelfth. That the said defendant received from the corporate authorities of the town of Santa Clara, in pursuance of said last-mentioned act of Congress, title in fee to the 30 acres within said town so re-incorporated in the year 1867, and that said Ferguson offered to prove the same facts, testified to by him in this case, by other witnesses; but it was admitted that such facts, so testified to, were proven and established for the purposes of this, and that they were the same facts as established and proven by said Ferguson before the register and receiver of said land-office in 1867, and that said Ferguson was ready and willing, and did do and perform, at all times since his settlement on said 158 acres of land in 1858, everything was necessary and required of him to do, in order to perfect his right of pre-emption to said land, which said one hundred and fifty-eight acres includes the land in the complaint described.

And this defendant now assigns for error on this his motion for a new trial herein—

45 I.

That the evidence does not sustain the finding or decision of the court herein, in this, to wit:

1st. For that the evidence shows that, at all times since the month of March, 1858, up to the present time, the defendant, George Ferguson, claimed, occupied, and possessed the premises in dispute in this case under the pre-emption laws of the United States.

2d. For that the evidence shows that defendant was at all times a qualified pre-emptor upon the land in dispute, since his settlement thereon in the month of March, 1858, up to the present time.

3d. For that the evidence shows defendant duly performed all the conditions required of him by the pre-emption laws of the United States, in pursuance of his settlement on this land, to perfect his pre-emption right thereto.

4th. For that the evidence shows that the defendant offered to make proof and payment to the proper officers of the land department of the United States long before the issuance of the patent to the grantor of the plaintiff, and that the refusal by said officers to accept the same was wrong and unlawful.

5th. For the evidence shows that the land in dispute in this case was duly held, claimed, occupied, and possessed by the defendant, as
46 a part of his pre-emption claim, at all times since the month of March, 1858, up to the present time.

6th. For that the evidence does not support or sustain, but is contrary to, the findings of the court, which findings sets forth that the two parcels of land purchased by the defendant of King and Pascal, in the month of February, 1858, were enclosed by separate fences, and that "defendant resided with his family on one of said tracts, and ever since 1858 has so continued to reside thereon."

7th. For that the evidence does not sustain, but is contrary portion of the findings which states and finds that "the defendant sold and disposed of a portion of the tract thus filed upon."

8th. For that the evidence shows that the land in contest was, at all times since the year 1858 up to the present time, held and claimed by defendant as a part of his pre-emption claim; hence the findings of the court that the plaintiff is entitled to recover in this action the premises in the complaint described is contrary to the evidence and to law.

II.

For that the evidence and the findings of the court (except those portions of the findings above excepted to) sustain the equitable defence interposed by the defendant to the plaintiff's complaint and his answer herein.

47 III.

That the decision of the court is contrary to law and the evidence, in this, to wit: That the evidence shows that the land described in the complaint is within the exception in the third section of the act of Congress of July 1st, 1862, under which the plaintiff in this action claims, *in this action*, through the Central and Western Pacific Railroad Companies, and hence did not pass to said railroad company, or any of them, by said act, or by any other act of Congress, as said premises was at all times since the month of March, 1858, up to the present time, held, occupied, possessed, and claimed by a qualified pre-emptor, to wit, by the defendant, George Ferguson.

IV.

That the judgment entered herein is contrary to the findings of the court and the evidence, in this, that the said judgment-order adjudge' and decrees that plaintiff, Charles McLaughlin, do have and recover of and from the defendant, George Ferguson, restitution of the premises in the complaint described, together with $220.00 damages for the withholding thereof, besides his costs, taxed at $240.60.

V.

That the finding of the court that the land-officers of the United

States rejected the claim of defendant is contrary to the evidence
48 and law, for that said officers had no authority to pass upon, adjudge, or determine the rights of the plaintiff or defendant to the land in dispute; and if done so by them, the same was without authority of law.

Respectfully,

B. B. NEWMAN,
Attorney for Defendant.

(Endorsed:) Filed October 8th, 1874. C. Finley, clerk.

Notice of motion to set aside order extending time to file statement.

(Title of court and cause.)

To the defendant in the above-entitled action, and to B. B. Newman, esq., your attorney therein:

Take notice that plaintiff will, on the 23d day of October, A. D. 1874, at the hour of ten o'clock a. m. on said day, at the court-room in which said court is held, in the city of San José, in said county, or as soon thereafter as counsel can be heard, move said court, or the judge thereof, to set aside the order made by said court or judge in said cause on the 28th day of September, 1874, allowing and granting said de-
49 fendant ten days' additional time in which to prepare and file a statement on motion for a new trial thereof.

That plaintiff will also, at said time and place, move said court or judge for an order denying defendant's motion for a new trial of said cause.

The grounds of said motion are, that no statement on motion for a new trial, bill of exceptions, affidavit, or anything else designating the grounds upon which defendant's motion will be made, have been proposed or filed in said cause within the time prescribed by law or the legal order of said court or judge thereof.

That said motion will be made upon the papers, judgments, records, orders, pleadings, affidavits, and files in said court in said cause.

J. A. MOULTRIE,
Attorney for Plaintiff.

Affidavit of service.

STATE OF CALIFORNIA,
County of Santa Clara, ss:

J. A. Moultrie, being duly sworn, says that he is the plaintiff's attorney in the action in which the within motion is entitled, and has his office and resides in the city of San José, in the county and State aforesaid; that B. B. Newman is the attorney for defendant in said
50 action, and resides and has his *his* office at the city of San Francisco, in said State; that there is a daily communication by United States mail between San José and San Francisco; that affiant has this day served a copy of the within notice upon said Newman by depositing the same in the post-office in said city of San José, addressed to him, the said Newman, at said city of San Francisco, upon which copy affiant paid the requisite amount of postage thereon, at the time of said deposit, to wit, the sum of six cents.

J. A. MOULTRIE.

Subscribed and sworn to before me this 9th day of October, 1874.

C. FINLEY, *Clerk*,
By M. J. ASHMORE, *Deputy.*

(Endorsed:) Filed October 9th, 1874.

Order denying motion for a new trial.

(Title of court and cause.)

On motion of J. A. Moultrie, attorney for plaintiff, in open court, it is ordered and adjudged that the motion of defendant for a new trial of said action be, and the same is hereby, denied, upon the ground that no bill of exceptions, affidavits, statement, or any other document, on motion for a new trial of said cause on behalf of defendant, has been
51 either settled, submitted, or filed herein within the time prescribed by law, October 23d, 1874.

D. BELDEN,
District Judge.

(Endorsed:) Filed October 23d, 1874.

Proposed amendment to defend int's statement.

(Title of court and cause.)

Now comes the plaintiff, and without waiving any of his legal rights, but saving and reserving them all, specially objects to the settlement or filing of any settled statement, on motion for a new trial of said action, because no statement has either been proposed or submitted, or served or filed, nor the draft of any, nor of any bill of exceptions, within the time prescribed by law, or the lawful order of said court or the judge thereof, or by any stipulation on the part of plaintiff or his attorneys; and for the further reason that the motion for a new trial herein has already been denied by the court, because no statement was filed within the time prescribed by law, and without prejudice to any of plaintiff's legal rights to object at the hearing to the statement filed herein, on the part of said defendant, by the clerk of said court, on the 8th day of October, A. D. 1874, or to any other statement or proposed statement, on motion for a new trial of said cause.

52 Plaintiff does not agree to defendant's said proposed statement on motion for a new trial, but he objects to the same; and prays that the portions thereof hereinafter indicated be stricken out, and that the following proposed amendments of plaintiff thereto be allowed:

Plaintiff moves to strike out the figures "3,800," on the 19th line on page 2, and insert in lieu thereof "1,800." Also, to strike out all after the word "of," on the 20th line of page 2, down to and including the word "since," on the 23d line on said page, and insert in lieu thereof the following: "A portion of the premises, and shortly went into possession with my family, but I never resided upon nor had enclosed any portion of the premises in controversy in this action." Also, to strike out all after the word "King," on the 27th line on said page 2, down to and including the word "since," on the 3d line on page 3, and insert in lieu thereof: "Neither King nor Pascal ever made me any deed for said premises." Also, to strike out all after the word "The," on said line 3 and page 3, down to and including the word "since," on line 6 on said page, and insert in lieu thereof the following: "the premises I occupied were only partially enclosed with a kind of old picket-fence." Also, to strike out all after the word "me," on the 12th line on said page 3, down to and including the word "land," on the 13th line on said page, and insert in lieu thereof the following: "but not on any portion of the land in dispute." Also, to strike out all after the word "office," on the
53 13th line on page 4, down to and including the word "register,"

on the 17th line of page 7, and insert in lieu thereof the following: "I think that I filed a declaratory statement on said premises in 1867 as a pre-emptor, but I am not certain." Also, to strike out all after the word "I," on line 20th, page 7, down to and including the word "barley," on the 22d line on said page, and insert in lieu thereof the following: "I never cultivated any portion of said premises." Also, to strike out all after the word "otherwise," on line 26th, on page 7, down to and including the word "it," on the 2d line on page 11. Also, to strike out all after the word "herein," on the 2d line on page 12, down to and including the word "described," on the 15th and 16th lines on page 13.

J. A. MOULTRIE,
Attorney for Plaintiff.

Affidavit of service.

STATE OF CALIFORNIA,
County of Santa Clara, ss:

J. A. Moultrie, being duly sworn, says that he is the plaintiff's attorney in the action in which the foregoing amendments to the defendant's proposed statement on motion for a new trial is entitled, and resides and has his office at the city of San Jose, in the county and
54 State aforesaid. That B. B. Newman is the attorney for said defendant Furguson in said action, and resides at and has his office in the city and county of San Francisco, in said State. That there is a daily communication by United States mail between said San Jose and said city of San Francisco. That affiant has this day served a copy of the foregoing proposed amendments to the defendant's proposed statement on motion for a new trial upon said Newman, by depositing the same in the United States post-office in said city of San Jose, addressed to him at said city of San Francisco, upon which copy affiant paid the requisite amount of postage at the time of said deposit, to wit, the sum of six cents.

J. A. MOULTRIE.

Subscribed and sworn to before me this 29th day of October, A. D. 1874.

C. FINLEY, *Clerk*,
By M. J. ASHMORE, *Deputy.*

(Endorsed:) Filed October 29th, 1874.

Notice of appeal.

(Title of court and cause.)

To the plaintiff in the above-entitled action, and J. Moultrie, esq., his attorney:

Please take notice that the defendant in the above-entitled
55 action hereby appeals to the supreme court of the State of California from the judgment, and the whole thereof, heretofore made and entered in said court in said action on the 3d day of August, 1874, in favor of the said plaintiff and against the said defendant, and from the order heretofore made in said court in said action on the 23d day of October, 1873, denying the said defendant's motion for a new trial in said action.

B. B. NEWMAN,
Attorney for Appellant.

To the clerk of said district court and J. A. Moultrie, esq., attorney for Charles McLaughlin, the plaintiff and respondent in the above-entitled action.

Filed November 2d, 1874.

Affidavit of service.

STATE OF CALIFORNIA,
County of Santa Clara, ss:

C. C. Stephens, being duly sworn, deposes and says that he is a white male citizen of the United States, attorney at law, over twenty-one years of age, and is competent to testify herein; that at 1 o'clock and 30 minutes p. m. on Monday, November 2d, A. D. 1874, affiant served the annexed notice of appeal in McLaughlin vs. Ferguson, twentieth district court, county of Santa Clara, on J. A. Moultrie, attorney for
56 plaintiff therein, by leaving a true copy of said notice with P. O. Minor, a competent person then having charge of said J. A. Moultrie's office, and then being therein; said Moultrie's office being in San Jose, said county, and said Minor having charge thereof at said time of service, the said Moultrie being absent therefrom at said time.

C. C. STEPHENS.

Subscribed and sworn to before me this 2d day of November, A. D. 1874.

W. C. KENNEDY,
Court Commissioner Twentieth District Court,
Santa Clara County, California.

Undertaking on appeal.

(Title to court and cause.)

Whereas George Ferguson, the defendant in the above-entitled action, is about to appeal to the supreme court of the State of California from a judgment made and entered against him in said action in the said district court in favor of the plaintiff in said action on the 3d day of August, A. D. 1874, for the restitution of certain premises situated in said county and fully described in said judgment:

Now, therefore, in consideration of the premises and of such appeal, and in pursuance of an order made by said court, we, the undersigned, J. H. Morgan, of the county of Santa Clara, by occupation a tax-collector, and M. S. Wilson, of same county, by occupation a justice
57 of the peace, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of five hundred dollars, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant shall pay the amount directed to be paid thereby, or the

part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

Dated San José, November 3d, A. D. 1874.

GEORGE FERGUSON. [SEAL.]
M. S. WILSON. [SEAL.]
J. H. MORGAN. [SEAL.]

STATE OF CALIFORNIA,
County of Santa Clara, ss:

J. H. Morgan and M. S. Wilson, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being
58 severally duly sworn, each for himself says that he is worth the amounts specified in said undertaking as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution, and that he is a resident of and a householder and freeholder within the county of Santa Clara and State of California.

J. H. MORGAN.
M. S. WILSON.

Subscribed and sworn to before me this 3d day of November, A. D. 1874.

C. FINLEY, *Clerk.*

(Endorsed:) Filed November 3d, 1874. C. Finley, clerk.

Undertaking on appeal.

(Title of court and cause.)

Whereas George Ferguson, the defendant in the above-entitled action, has appealed, or is about to appeal, to the supreme court of the State of California from an order of said court made and entered in said district court on the 23d day of October, A. D. 1874, denying the said appellant's motion for a new trial in said action.

And whereas said appellant is desirous of appealing from said order so made and entered against him to the supreme court of the State of California:

59 Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, J. H. Morgan, of the county of Santa Clara, and M. S. Wilson, of the county of Santa Clara, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hund*d*red dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 7th day of November, A. D. 1874.

J. H. MORGAN. [SEAL.]
M. S. WILSON. [SEAL.]

STATE OF CALIFORNIA,
County of Santa Clara, ss:

J. H. Morgan and M. S. Wilson, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says that he is worth the amount

specified in the said undertaking as the penalty thereof, over and above his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident of the State of California.

J. H. MORGAN.
M. S. WILSON.

Subscribed and sworn to before me this 7th day of November, 1874.

C. FINLEY, *Clerk*,
By EDGAR POMEROY,
Deputy.

60 (Endorsed:) Filed Nov. 7th, 1874.

Clerk's certificate.

(Title of court and cause.)

I, Cornelius Finley, county clerk of the county of Santa Clara, and ex-officio clerk of the district court of the twentieth judicial district of the State of California, in and for the county of Santa Clara, do hereby certify that the foregoing, from folio 1 to 176, inclusive, are full, true, and correct copies of original papers on file in my office, and records in the above-entitled cause; that the same constitute the certified transcript on appeal of said defendant to the supreme court of the State of California from the judgment heretofore rendered in said action, and from the order of said court denying defendant's motion for a new trial therein.

And I further certify that undertakings on appeal, conditioned according to law, and in the penal amount fixed by the order of court herein, and for the payment of costs on appeal, was filed by said appellant within the statutory time in said cause.

Witness my hand and the seal of said district court this 12th day of December, A. D. 1874.

[SEAL.]

C. FINLEY,
Clerk.

61 *Appellant's assignment of errors on appeal.*

(Title of court and cause.)

The appellant assigns for errors on the appeal from the judgment:

I.

The errors assigned on motion for a new trial, commencing at folio 131, page 45, and ending with folio 141, page 48 of transcript.

II.

That the judgment appealed from is not sustained by the findings of the court, commencing at folio 44, page 16, and ending with folio 71, page 24 of transcript, in the following particulars:

First. For that the court finds (folios 48, 49, and 50, page 17 of transcript) "that appellant was at the time of his entry upon the land in dispute, in 1858, and ever since has been, possessed of all the necessary qualifications of a pre-emptor upon his 158 acres."

Therefore the point of error of which appellant complains in the judgment is, that as this finding shows that appellant was a qualified pre-emptor upon the 158 acres claimed by him at all times since 1858 up to the present time, then the land in dispute, being a part of said 158 acres, was not granted to the Central Pacific Railroad, or to the Western Pacific Railroad Company, the assignors of respondent, for *by* the third section of the act of Congress of July 1st, 1862, under which said companies claim, expressly withholds from grant to said company
62 land held or claimed by pre-emption. The words of section 3 of said act being as follows:

"That there shall be, and hereby is, granted to said company * * * every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have been attached at the time the line of said road is definitely fixed." (U. S. Stautes at Large, vol. 12, page 489.)

This section is made applicable to the Central Pacific Railroad Company by section 9 of the act. And the court in its fourteenth finding (folio 59, page 20 of transcript) finds that the respondent, on behalf of the two railroad companies above named, presented the claim of said companies to the proper land-officers, under the acts of Congress of July 1st, 1862, July 2, 1864, and March 3d, 1865, for said lot, and the same was awarded to said Western Pacific Railroad Company, under said acts of Congress, and (folio 60, page 21 of transcript) a patent issued to said company for said lot, and said company conveyed its right thereto to plaintiff. As the land was excepted from the grant to the railroad company by reason of a pre-emption right having thereto attached at the time of the definite location of the line of said road, which the court finds (folio 69, page 24 of transcript) to be on the 30th day of January, 1865, it was error in the court to give judgment for the respondent; for the land, not
63 being granted by Congress, the ministerial officer, by issuing a patent therefor, could convey no title thereto to respondent's grantor; but if title was conveyed thereby, it enured in equity to appellant, as appellant's right attached to the land in dispute long before any grant was made to said railroad companies; for appellant, the court finds, (folio 57, page 20 of transcript,) made a new settlement upon his 158 acres, including this land, immediately after the passage of the act of Congress of May 30th, 1862, and the first congressional act granting land to the Central Pacific Railroad Company being passed July 1st, 1862, was subsequent to said appellant's settlement, and the right of said company to such lands as were granted by that act did not attach thereto "until the line of said road was definitely fixed," (sec. 3, act July 1st, 1862, referred to,) which the court finds to be "definitely fixed" (folio 69, page 24 of transcript) on the 30th day of January, 1865; therefore, the right of appellant as a pre-emptor having attached to the land in dispute on the 30th of January, 1865, and as early as May 20th, 1862, long before the said railroad companies could lay any claim to it, appellant, under his answer and equitable cross-complaint, was entitled to judgment, and the judgment in favor of respondent is contrary to law and the evidence and to the findings.

III.

The judgment appealed from is contrary to the evidence and the
64 whole findings of the court, but more particularly to the first

finding, beginning at folio 45, page 16, and ending with folio 51, page 18 of transcript; for by the finding referred to, construed in connection with the other findings, respondent was not entitled to judgment appealed from, and the same is contrary to the findings and law.

IV.

The judgment appealed from is contrary to law and to the findings in this, to wit: that the court finds (folio 15, top of page 18 of transcript) that all of the land settled upon by appellant in 1858 (158 acres) was situated outside the limits of the town of Santa Clara, as it then was established, and the re-incorporation of the town March 31, 1866, being without the procurement of appellant, as the court finds, (folio 31, finding ix, page 18 of transcript,) the enlargement of the town so as to divide appellant's 158 acres, and include within said corporate limits about 30 acres, (folio 51, page 18 of transcript,) including his dwelling-house, could not divest or take away from appellant the vested rights that he had in all his land under the pre-emption laws at and before such re-incorporation; therefore, the judgment appealed from is contrary to law.

V.

The judgment appealed from is contrary to law in this, to wit: that the court finds in its first finding (commencing at folio 45, page
65 16, and ending with folio 49, page 17 of transcript) that appellant was at all times since 1858 up to the present time a qualified pre-emptor upon the 158 acres settled upon by him, of which the lot in dispute is a part, and done and performed everything required of him by law in order to perfect the right of pre-emption; therefore the land was not granted by any act of Congress to any or either of said railroad companies, and the rejection of the claim of appellant by the land-officers of the United States, and awarding the land in dispute to said railroad company, was contrary to law from the facts, and the equity powers of the court which tried the case and rendered the judgment appealed from should correct the wrongs complained of by appellant in his cross-complaint, (to be found commencing at folio 9, page 4, and ending with folio 43, page 15 of transcript,) as said cross-complaint was duly verified, and neither answered or denied by respondent.

VI.

The judgment appealed from is against law, as shown by the whole findings of the court, (commencing at folio 45, page 16, and ending with folio 17, page 24 of transcript.)

VII.

The judgment is erroneous in so far as it includes $240.61 for costs, as no cost-bill was filed or served on appellant as required by section 1033 of the code of civil procedure.

66 *Appellant's assignment of errors on appeal from the order refusing appellant a new trial.*

I.

The court erred in sustaining the respondent's motion to strike out and deny appellant's motion for a new trial, (folio 149, page 50 of tran-

script,) as appellant had duly filed and served his proposed statement on motion for a new trial within the time allowed by law, after filing and serving his second notice of motion for a new trial, and such notice being served and filed within the time allowed by law after appellant received notice from respondent of the entry of judgment, as required by section 659 of the code of civil procedure; the notice of the entry of the judgment having been filed and served on appellant on the 18th day of September, 1874; and appellant's second notice having been filed and served on respondent on the 28th day of September, 1874, (folio 101, page 35 transcript;) and the appellant's proposed statement on his motion for a new trial having been duly filed and served on respondent on the 8th of October, 1874, (folio 141, page 48 transcript,) it was error in the court to deny appellant's application for a new trial on the grounds in said order designated. (Folio 149, page 50 transcript.

B. B. NEWMAN,
Attorney for Plaintiff.

67 *Stipulation.*

(Title of court and cause.)

It is hereby certified, stipulated, and agreed by and between the attorneys of the respective parties to the above-entitled action that the foregoing printed pages, from 1 to 60, both inclusive, being 179 folios, constitute, shall be, and is, the transcript, and the whole thereof, on appeal to the supreme court of the State of California in the above-entitled action, and that the same, and the whole thereof, are true copies of the original papers, pleadings, judgment, and findings of the court, statement on motion for a new trial, and notices, documents, and papers on file in the court from which said appeal is taken in said action, and of the notice of appeal and undertaking on appeal therein, and that the notice of motion for a new trial, to be found beginning at folio 93, page 32, and ending with folio 101, page 35, of said printed transcript, was duly served upon the attorney of the respondent on the 28th day of September, 1874; and that the statement of appellant on motion for a new trial, commencing at folio 102, page 35, and ending with folio 141, page 48 of said printed transcript, was duly served upon the attorney of respondent on the 28th day of September, 1874, and that the diagram to be found between folios 120, 121, and 122, on page 41 of said printed transcript, is a true and correct diagram of the original, on file in said district court; and that a good and sufficient undertaking
68 on appeal from the judgment and from the order overruling appellant's motion for a new trial in said action has been duly filed therein with the clerk of the court from which said appeal is taken.

69 In the supreme court of the State of California, April term, A. D. 1875.

CHARLES MCLAUGHLIN, RESPONDENT, *vs.* GEORGE FERGUSON, APPELLANT. } No. 4594. On appeal from the district court of the 20th judicial district, in and for the county of Santa Clara.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and

singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered from the bench.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment and order of the district court of the 20th judicial district, in and for the county of Santa Clara, in the above-entitled cause, be, and the same is hereby, affirmed, with costs.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 6th day of May, A. D. 1875, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 13th day of August, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy*.

(Indorsed:) No. 4594. In the supreme court, State of California. Remittitur. McLaughlin vs. Ferguson. Clerk's cost, $15; paid by appellant, $15; paid by respondent, $. Total, $15. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

70 Know all men by these presents, that we, M. S. Wilson and J. H. Morgan, both residents and freeholders of the county of Santa Clara, State of California, are held and firmly bound unto Charles McLaughlin in the full and just sum of fifteen hundred ($1,500.00) dollars, gold coin of the United States, to be paid to the said Charles McLaughlin, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 12th day of May, in the year of our Lord one thousand eight hundred and seventy-five, (1875.)

Whereas, lately, at a term of the supreme court of the State of California, in a suit depending in said court between Charles McLaughlin, plaintiff, and George Ferguson, defendant, judgment was rendered against the said defendant; and the said defendant having obtained a writ of error from the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said supreme court of the State of California, to reverse the judgment of said supreme court of the
71 State of California in the aforesaid action, and a citation directed to the said Charles McLaughlin, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said George Ferguson shall prosecute said writ of error to effect, and answer all damages and costs which may be adjudged against him if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

M. S. WILSON. [SEAL.]
J. H. MORGAN. [SEAL.]

Executed, sealed, and delivered in presence of—
C. C. STEPHENS.
J. C. BLACK.

STATE OF CALIFORNIA,
County of Santa Clara, ss:

M. S. Wilson and J. H. Morgan, being each duly sworn, each for himself says upon oath that he is a resident freeholder of the county of

Santa Clara, State of California, and that he is worth the sum of fifteen hundred dollars, the amount of the foregoing bond, over and above all his debts and liabilities, exclusive of property exempt from execution.

M. S. WILSON. [SEAL.]
J. H. MORGAN. [SEAL.]

72 Subscribed and sworn to before me this 12th day of May, A. D. 1875.

[NOTARY'S SEAL.] C. C. STEPHENS,
Notary Public, Santa Clara County, State of California.

(Indorsed:) Supreme court, State of California. 4594. Undertaking on writ of error to Supreme Court of the U. S. by pl'ff in error. Charles McLaughlin, pl'ff & resp'd't, vs. Geo. Ferguson, def't & appellant and pl'ff in error.

The form and sufficiency of the within bond is approved by me this thirteenth day of May, 1875.

W'M T. WALLACE,
Chief-Justice.

Filed May 13th, 1875.

GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy.*

73 UNITED STATES OF AMERICA, *ss:*

To Charles McLaughlin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein George Ferguson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable William P. Wallace, chief-justice of the supreme court of the State of California, this thirteenth day of May, A. D. 1875, and of the Independence of the United States the ninety-ninth.

[SEAL.] W'M T. WALLACE,
Chief-Justice of Supreme Court of State of California.

(Indorsed:)
A copy of this left with me this 14 day of May, A. D. 1875.
TULLY R. WISE,
Att'y at Law.

A copy of this left with me, this 29th day of May, 1875.
J. A. MOULTRIE,
Att'y for Cha's McLaughlin, Def't in Error.

(Indorsed:) United States Supreme Court. George Furguson, pl'ff in error, vs Charles McLaughlin, def't in error. Citation.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of

the judgment of a plea which is in the said supreme court, before you, between George Ferguson, plaintiff in error, and Charles McLaughlin, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings aforesaid be' inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this eleventh day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.]

L. S. B. SAWYER,
Clerk of U. S. Circuit Court, Cal.,
By J. F. O'BEIRNE,
Deputy Clerk.

The above writ of error is hereby allowed.

W'M T. WALLACE,
Chief-Justice of the Supreme Court of the State of California.

The answer of the justices of the supreme court of the State of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.]

GRANT I. TAGGART,
Clerk,
By ALLEN TILLINGHAST,
Deputy Clerk.

(Indorsed:) 4594. United States Supreme Court. George Ferguson, plaintiff in error, vs. Cha's McLaughlin, defendant in error. Writ of error. Filed May 13th, 1875. Grant I. Taggert, clerk, by Allen Tillinghast, deputy.

75 In the supreme court of the State of California.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify the within and foregoing to be the original writ of error, a full, true, and correct copy of the transcript, judgment, and bond, and the original citation filed in my office in the matter of Charles McLaughlin, plaintiff and respondent, vs. George Ferguson, defendant and appellant.

In witness whereof I have hereunto set my hand and the seal of said supreme court this 13th day of August, A. D. 1875.

[SEAL.]

GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST,
Deputy.

76 In the Supreme Court of the United States.

GEORGE FERGUSON, PLAINTIFF IN ERROR,
vs.
CHARLES MCLAUGHLIN, DEFENDANT IN ERROR.

And now comes the said plaintiff in error, and says that in the record and proceedings of the supreme court of the State of California in said action, and in its giving of judgment therein affirming the judgment of the district court of the twentieth judicial district of the State of California, in and for the county of Santa Clara therein, there is manifest error, in this, to wit, that said supreme court of the State of California affirmed said judgment of said twentieth district court; whereas by the law of the land said judgment of said twentieth district court therein should have been reversed.

And said plaintiff in error prays that the judgment of said supreme court of the State of California aforesaid, for the error aforesaid, and other errors in the said record and proceedings appearing, be reversed, annulled, and for naught held, and that he be restored to all things which he has lost thereby, and that such judgment be rendered herein as the said supreme court of the State of California ought to have rendered, and that the same be executed.

W. W. FOOTE,
Att'y for Pl'ff in Error.

(Indorsed:) In Supreme Court of the U. S. No. 595. George Ferguson, pl'ff in error, vs. Charles McLaughlin, def't in error. Assignment of errors. Filed 16 September, 1875.

(Indorsement on cover:) No. 123. George Ferguson, plaintiff in error, vs. Charles McLaughlin. California sup. court. Filed 16th September, 1875.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 123.

GEORGE FERGUSON,

PLAINTIFF IN ERROR,

VS.

CHAS. McLAUGHLIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF ~~S. P. [illegible]~~ J. A. MOULTRIE,

FOR DEFENDANT IN ERROR.

IN THE

Supreme Court of the United States.

GEORGE FERGUSON,

Plaintiff in Error,

vs.

CHARLES McLAUGHLIN.

STATEMENT.

This is an action of ejectment instituted by Charles McLaughlin, the plaintiff below, defendant here, in a District Court of California, to recover a fractional section of land comprising twenty-two acres and nineteen one-hundredths of an acre, being a portion of Section 35, T 6 S, R 1 W, Mount Diablo base and meridian.

The plaintiff asserts title to the premises under a patent from the United States, issued to the Western Pacific Railroad Company, of California, bearing date on the 24th day of December, 1872, under and in pursuance of the Acts of Congress

passed July 1st, 1862, July 2d, 1864, March 5th, 1865, and the joint resolution of May 21st, 1866, generally known as the "Pacific Railroad Acts." The land is within the limit of said Railroad grant as finally located, and within the reservation made by the Commissioners of the General Land Office on the 23d of December, 1864.

The defendant below, filed, on the 13th of April, 1874, the pleading upon which the cause was tried on his behalf, which he is pleased to style an "amended answer and cross complaint," [Trans. fol. 4] wherein he admi's possession and adverse holding of the demanded premises, but denies that plaintiff has any right or title thereto, and seeks to have him declared his trustee as to said land.

There is no allegation charging any relation of trust or confidence between the parties, nor any allegation charging fraudulent practices on the part of McLaughlin, or his vendor, or any of the officers of the Land Department. But the alleged trust is sought to be worked out by attempting to show that said land had been wrongfully patented to said Railroad Company.

The Court first passed upon the equitable defence—ordered the so-called "cross complaint" dismissed for want of equity to support it, and refused to hear counter proofs on the part of plaintiff. It also found the same facts as to the law side of the case, and rendered judgment for plaintiff in accordance with the prayer of his complaint. [Trans. fols. 25–6.]

The defendant moved for a new trial, which was denied, then appealed from the judgment and

order denying said motion, to the Supreme Court of the State; the judgment having been there affirmed, he sued out a writ of error and has brought the cause here.

The findings will be referred to as we progress with the argument, as occasion may require.

II.

The point was made for the first time in the Supreme Court—and we assume will again be made here—that as the defendant put in a verified cross-bill, and its allegations not having been denied by any pleading, it is confessed. There are three answers to this proposition:

1st—At the time the pleadings were filed, and during the pendency of the action in the State Courts, no such pleading as a cross-complaint was *permitted*, under the practice in California. Such a pleading was allowed under a former system of practice, and is now, under the Code of Civil Procedure, as amended, but there was none, as before stated, during the pendency of this action. The Code of Civil Procedure [Sec. 422] then provided as follows: "The only pleadings allowed on the part of plaintiff are, 1st, the complaint; 2d, the demurrer to the answer. On the part of the defendant, 1st, the demurrer to the complaint 2d, the answer."

Section 437 provided: "The answer of defendant shall contain—1st, if the complaint is verified, a specific denial of each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief; or, if the

complaint is not verified, then a general denial of each of said allegations; but a general denial only puts in issue the material allegations of the complaint. 2d, A statement of any new matter in avoidance, or constituting a defence or counter claim." It will be thus seen if new matter was introduced in an answer it was merely defensive.

And by Section 462 of the same code, the law put in a denial of all new matter. It reads: "Every material allegation of the complaint not controverted by the answer, must, for the purposes of the action, be taken as true; the *statement of any new matter in the answer* in avoidance, or *constituting a defence*, or counter claim must on the trial, be deemed controverted by the opposite party."

Thompson vs. Thompson, Sup. Court of Cal., Nov. T. 1876, (not reported.)

2d—But even if every fact alleged in said so-called "cross-complaint" was taken as true, still no case is made giving defendant any right whatever to relief, as we shall presently show.

3d—It is not a federal question.

III.

The record is encumbered with much irrelevant matter in support of the motion for a new trial. But the appeal from the order denying said motion cannot be entertained, because the record fails to furnish anything to support it, there being no bill of exceptions, settled statement, affidavits or minutes of the Court, as required by the Code of

Civil Procedure, Sec. 658, 661 and 950. [Trans. fols. 50 and 517.]

The appeal from the District Court to the Supreme Court only brought up the judgment roll; and the writ of error brings that record here. The sole question, therefore which is presented for the determination of this Court is, whether upon the facts found, the State Courts erred in rendering judgment for plaintiff.

IV.

The 9th and 11th finding [Trans. fols. 18, 19] show that Ferguson never had his dwelling house upon, or resided on said lot, nor even in the township where it is situated.

There is no finding that he ever made, or offered to make oath that he had not directly or indirectly made any agreement or contract with any person, by which the title he sought to acquire, by reason of his alleged pre-emption claim should inure in whole or in part, to the benefit of any other person than himself.

Revised statutes U. S., Sec. 2262.
Warren vs. Van Brunt, 19 Wal. 654.

There is no finding that he settled upon the alleged claim acquired from King & Paschal, as a pre-emptor.

V.

The findings show that, continuously, from 1858, until the commencement of this action, he resided in Township 7 S., R. 1 W.;

that in March, 1866, the corporate limits of the town of Santa Clara were so extended as to include, among other lands, about 30 acres of said Township seven then in his possession, and upon which he resided, and had his dwelling house. [Trans. pp. 8, 9, findings XI]

That March ~~in~~ 1867 [Trans folio IX, findings XII], Congress granted to said town all the land within its corporate limits, in trust, for the benefit of its inhabitants.

That on the 20th of December, 1867, said town, pursuant to said Act of Congress, conveyed to him said 30 acres [Trans. page 9, findings 12].

VI.

The 10th and 11th finding, [Trans. page 9] show that Ferguson filed two declaratory statements, at different times, for separate and distinct parcels of land situated in different townships. [Trans. page 9, finding 11.] But the finding is silent as to what portion, or subdivision of township 7 he filed; be that as it may, the record shows that the alleged filing on township 7 was October 5th, 1866, [Trans. fol. 21] and that the plat of said township was not filed until three days afterwards, wherefore said filing was a mere nullity. [Trans. fol. 8.]

VII.

The Register and Receiver, Commissioner of the General Land Office, and the Secretary of the Interior, each and all, after duly considering all

the evidence produced on the part of Ferguson decided that he had no claim whatever, to said land under the laws of the United States. The Commissioner further found from the evidence that his dwelling house was in township 7 S, R 1 W, and after filing on said lands, *he sold and conveyed to different parties various aggregate parcels thereof;* and for the latter reason—among others—he held that Ferguson was not a *bona fide* settler on the public lands, such as the law contemplates. (Finding 15.) This finding of the Commissioner is corroborated by the fact that Ferguson's alleged possessory claim acquired from King & Paschal, contained 158 acres (finding, page 8, folio 16) while he only pretends to have attempted to pre-empt 144 69-100 acres. (Trans. page 9, finding 11.)

VIII.

The record is wholly silent as to what testimony Ferguson introduced before the officers of the Land Department in support of his alleged claim; neither has there been any attempt to show fraud, unfairness or mistake on the part of any of the officers. This Court has uniformally held (likewise the Supreme Court of California), that in the absence of any question of fraud, or trust, or showing as to what the proofs were upon which said officers acted, it will not disturb their decision.

Johnson vs. Towsley, 13 Wal., 72.
Shipley vs. Cowen, 1st Otto., 340.
Hosmer vs. Wallace, 47 Cal., 461.

Burrell vs. Haw, 48 Cal., 422.

"If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their ruling may be reversed and annulled by the Courts, when a controversy arises between private parties, founded upon their decision; but for mere errors of judgment upon the weight of evidence, in a contested case before them, the only remedy is by an appeal from one officer to another of the department, and perhaps under special circumstances to the President. It may also be, and probably is, true, that the Courts may furnish in proper cases relief to a party where new evidence is discovered, which if possessed and presented at the time would have changed the action of the law officers; but except in such cases the ruling of the department on disputed questions of fact, made in a contested case, must be taken when the ruling is collaterally assailed, as conclusive.

Shipley vs. Cowen, 1 Otto, 340.
Burrell vs. Haw, 48 Cal. 422.

"In the absence of mistake, fraud or imposition in the officers of the United States Land Department, their determination on matters of fact, relating to the entry of lands, can not be reviewed by the Courts; but their decision on questions of law may be."

Hosmer vs. Wallace, 46 Cal., 461.

This is an attempt on the part of Ferguson to make out an entirely new and different case in the Courts from what he made before the Land

Department, after having been finally defeated before each and all of those officers.

This Court is not asked to *review* the facts established before those officers and apply the law thereto, but an attempt to establish a manufactured claim to public land as a pre-emptor in the Courts, independent of the tribunals expressly established to determine the validity of such claims. To enable him to obtain the relief which he seeks, in this action, it was necessary for him to show that he possessed all the qualifications and performed all the acts, and complied with all the conditions required by law, to enable him to pre-empt said land, and that he proved those facts by competent testimony, before the officers of the Land Department. It was also incumbent upon him to show that said officers had been imposed upon and deceived by the misrepresentations and fraudulent practices of McLaughlin or his grantor, and thereby induced to decide adversely to him.

Burrell vs. Haw, 48 Cal., 522.

The findings show that Ferguson never resided in the township where the land is situated, that and the town of Santa Clara conveyed to him the thirty-acre tract in Township 7, upon which he resided.

There is no finding that he ever offered to pay the Government for said land, or that he was *not the owner of* 320 *acres of land* in any State or Territory of the *United States*, as required by Section 10 of the Act of Congress, entitled "An Act to Appropriate the Proceeds of the Public Lands, and to Grant Pre-emption Rights," approved Sept. 4th, 1841 (U. S. Statutes, vol. 5,

page 455), or that he ever offered to prove before any of said officers any settlement upon or improvements on said land, as required by Section 12 of said Act.

There is no finding that he was qualified, offered to, or did take the oath required by the 13th Section of said Act, and the presumption is that he *could not*. He studiously refrained from informing the Court what proofs he introduced, if any, before the officers of the Land Department in support of his alleged claim.

It is found that each and all of said officers decided that he had no claim to the land under the laws of the United States, and there is no finding that there was any mistake, or imposition, or fraud practised by, or upon, any of said officers.

IX.

All of said officers having decided that he was not a *bona fide* settler on the public lands, and that no pre-emption claim had ever attached to the lot in question.

The whole of defendant's argument is founded upon the false hypothesis that a pre-emption claim is shown to have attached to the land, and that he was a qualified pre-emptor.

No fault is found with the doctrine enunciated in the authorities to which he refers, but we are unable to perceive that they have any application to the facts of this case.

The point that the officers of the General Land Department had no jurisdiction to hear and determine whether or not Ferguson was a qualified

pre-emptor, and whether or not he had any claim to the lot, as such, is untenable and deemed too absurd to need further consideration; moreover, having invoked their jurisdiction, he will not now, since they each and all decided adversely to him, be heard to question their decision.

We had not supposed that a mere trespasser upon the public lands, after being finally defeated before the Land Department could wholly ignore their proceedings, and compel the Courts to try the claim *de novo*, precisely as though no investigation had ever been had before those tribunals. By what method he expects this Court to review the decision of those officers when he has failed to furnish it the evidence upon which they acted, we are unable to comprehend.

X

To recapitulate. It appearing that all the officers of the Land Department having found that defendant was not a *bona fide* settler upon the public lands; that he had no claim to the premises, under the laws of the United States, and the Court being wholly unadvised as to what the proofs were upon which said officers decided, or what facts were presented for their consideration; that Congress granted the thirty-acre tract in Township 7, upon which he resided, to the town of Santa Clara; that he recognized said grant and acquired the title to said thirty acres from said town; that he filed his declaratory statement thereon three days before the township plat was filed; that it does not appear upon what subdi-

vision of said township his alleged dwelling was; that he failed to show that he was not the owner of 320 acres of land in any State or Territory of the United States, or that he ever offered to pay for the land or take the oath as required by the 10th Section of said Act of Congress, of 1841, and the rules and regulations of the General Land Department, and no finding of any fraud, mistake or imposition on the part of, or upon any of the officers of said department, and that plaintiff below held the legal title under the patent of the United States, regularly issued in pursuance of the laws of Congress, free from fraud, imposition, accident or mistake.

It is respectfully submitted that the judgment of the Court below should be affirmed, with damages and costs.

~~S. F. LEIB and~~ J. A. MOULTRIE,

For Defendant in Error.

No. 123.

In the Supreme Court

OF THE

UNITED STATES.

GEORGE FERGUSON,
Plaintiff in Error,

vs.

CHARLES McLAUGHLIN,
Defendant in Error.

In Error to Supreme Court of State of California.

Statement of Case and Points and Authorities for Plaintiff in Error.

W. W. FOOTE,
Of Counsel for Pl'ff in Error.

SAN FRANCISCO:
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1877.

IN THE SUPREME COURT

OF THE

UNITED STATES.

GEORGE FERGUSON,
Plaintiff in Error,

vs.

CHARLES McLAUGHLIN,
Defendant in Error.

Statement of Case and Points and Authorities for Plaintiff in Error.

This is an action in the nature of *ejectment* brought by the now defendant in error on June 12th, 1873, in the District Court of the 20th Judicial District of the State of California, in and for Santa Clara County, to recover possession of certain land, described as Lot 4, of Section number 35, in Township number 6 South, of Range number 1 West, of Mount Diablo base and meridian, containing 22 79-100 acres, according to the United States Surveys, and damages for detention, rents and profits, etc., on the alleged ground that said defendant in error was, at the commencement of said action, the *owner thereof* in fee simple.

Trans., page 1.

The plaintiff in error, by his answer, denied the ownership of the defendant in error, etc., and by a *cross-complaint* (allowed under the California State practice) set up certain facts from which he claimed that if the defendant in error *held* the *legal title* of said land, he ought, by the said District Court, as a court of equity, to be adjudged a *trustee* thereof for said plaintiff in error, and *compelled to convey* the same to him.

Trans., pages 2 to 7.

Said action was tried before said District Court without a jury, a jury having been waived by said parties.

The Court filed a "finding of facts," and, as a "conclusion of law," decided that plaintiff in error was not entitled to the relief sought in his *cross-complaint*, but that defendant in error was entitled to recover the possession of said premises and damages; and judgment was thereupon entered accordingly.

Trans., pages 7 to 12.

A motion for a new trial was made, but denied because no bill of exceptions, affidavits, or statement of case therefor was properly prepared, settled and filed.

Trans., pages 12 to 23.

The case was appealed to the Supreme Court of the State of California, where the judgment of the lower court was affirmed.

This writ of error is prosecuted to reverse the judgment of said Supreme Court of California.

The case must, undoubtedly, turn upon the question whether the judgment of the lower Court was correct upon the "facts found" by it, the respective rights of said parties depending entirely upon Federal Statutes and proceedings thereunder.

These "facts found" so far as essential to be noticed, are as follows:

(1.) That, in February, 1858, plaintiff in error bought the possessory right and improvements of two several parties upon two parcels of land lying adjacent and contiguous to each other, and together constituting a tract of about 158 acres, (including the premises now in controversy,) paying therefor about $2800, said land being then enclosed with fences.

Trans., pages 7–8.

(2.) That, in May, 1858, said plaintiff in error entered into the actual occupancy of said land, and has resided thereon with his family ever since, has kept said land always enclosed by substantial fences, and has used the whole thereof continuously for cultivation, pasturage and farming purposes, down to the present time, his permanent improvements thereon being, during all of said time, of the value of $2000 in U. S. gold coin.

Trans., page 8.

(3.) That, at the time of his entry upon said land in 1858, said plaintiff in error was, and has

always since been a citizen of the United States, over 21 years of age, and the head of a family; that he did not leave land of his own to settle on said land, and that he never had or claimed any other pre-emption or homestead right within the State of California.

Trans., page 8.

(4.) That said land is agricultural land, there being neither mines nor salines upon it.

Trans., page 8.

(5.) That said plaintiff in error "made *no agreement* or *contract* of *any character whatever*, with *any person*, by which the title he proposed to secure and obtain from the United States Government, should *enure in whole or in part* to *any person* other than said Ferguson himself."

Trans., page 8.

(6.) That said plaintiff in error has always, since his purchase of such possessory right, and entry upon said land, "*claimed* and proposed holding the same under the pre-emption laws of the United States."

Trans., page 8.

(7.) That a small portion of said land, to wit: about 30 acres thereof, on which the dwelling house of said plaintiff in error stood, was situated in Township number 7 south, of Range number 1 west, the remaining portion thereof being situated

within Township number 6 south, of said Range, base and meridian.

Trans., pages 8–9.

(8.) That, at the time of said plaintiff in error's entry and settlement upon said land in 1858, the same was *unsurveyed* public land of the United States; and that it was *all of it* then "situated outside the corporate limits of the town of Santa Clara, as the same were then established."

Trans., page 8.

(9.) That on March 31st, 1866, the Legislature of California, by Act, enlarged the corporate limits of said town of Santa Clara, so as to *include therein all of that portion of said tract of land which was within said Township number* 7. And on March 1st, 1867, the United States, by Act of Congress, *relinquished and granted* to the corporate authorities of said town, all the right and title of said United States in and to *said portion*, as well as to the other lands within said enlarged corporate limits, in trust to be conveyed to the parties then in the *bona fide* actual possession thereof, which trust was executed by said corporate authorities, on December 20th, 1867, by conveyance of *said portion* to said plaintiff in error.

Trans., pages 8–9.

(10.) That on May 19th, 1866, a Township Plat of United States survey of said Township 6 south, Range 1 west, was filed in the United States

Land Office at San Francisco, within which District the same was situated, which survey and plat included the land now in dispute; and that, on on June 5th, 1866, (said Township number 7 not having then been surveyed,) said plaintiff in error filed with the Register of said Land Office, his declaratory statement for the *portion* of his said pre-emption claim which was *situated in that Township*, including the *land now in dispute.*

Trans., pages 8–9.

(11.) That on October 7th, 1866, a Township Plat of United States survey of said Township 7 south, of Range 1 west, was filed in said Land Office, said last mentioned survey and plat including the *portion* of said pre-emption claim which was situated within said Township 7, and on which said plaintiff in error's dwelling house stood.

Trans., page 9.

(12.) That, upon the filing of said last mentioned plat of survey, said plaintiff in error "requested the said Register to allow him to *amend* the declaratory statement already filed by him," (intending to include therein the *said portion* of said pre-emption which was situated in said Township number 7, then just surveyed,) "but said Register *refused to allow him to do so*, but directed him to file a *separate* declaratory statement for said land so embraced within said town limits," (to wit: within said Township number 7,) which

said plaintiff in error, accordingly, "did *under protest.*"

Trans., page 9.

(13.) That in December, 1866, and thereafter said plaintiff in error made, before the Register and Receiver of said Land Office, proof of his right of pre-emption to the land now in controversy with the other land claimed by him in said Township number 6 south, of Range number 1 West, embraced in his said Declaratory Statement first mentioned, and said defendant in error, in the name and on the behalf of the "Western Pacific Railroad Company," contested his right to said land, claiming it for said "Western Pacific Railroad Company" under the several Acts of Congress granting lands to the Central and to said Western Pacific Railroad Companies, and upon such contest the whole of said pre-emption claim which was *situated in said Township number 6, including the land now in dispute*, was, by said Register and Receiver, and afterwards by the Commissioner of the General Land Office and the Secretary of the Interior, *awarded to said Western Pacific Railroad Company* to which Company, on December 24th, 1872, a United States patent for said land was issued.

Trans., pages 9 and 10.

(14.) "That by said Commissioner of the General Land Office it was *found* and *decided* that said

premises in controversy were *within* the *corporate limits* of the town of Santa Clara," etc.

Trans., page 10.

(15.) That "it was further found and decided *by said Commissioner* that said Ferguson (plaintiff in error) *after filing* upon said land, had sold and disposed of a *portion* of said tract thus filed upon," etc., and that, therefore, he could not be regarded as a *bona fide* settler on the public lands prior to the withdrawal, etc., which decision, on appeal, was affirmed by the Secretary of Interior.

Trans., page 10.

(16.) That on July 2, 1862, Congress by Act granted to the Central Pacific Railroad Company of California, to aid in the construction of a railroad, every alternate section of land, designated by odd numbers, within five miles of the line of said road upon the definite location thereof, and that said Central Pacific Railroad Company, on December 15th, 1864, assigned all its rights, under said Act and the subsequent Act of July 2d, 1864, to construct this portion of said Railroad, and to the land granted to aid its construction, to the Western Pacific Railroad Company, and that such assignment was recognized by Congress on March 3d, 1865; and that the lot in dispute in this action is situated within five miles of the line of said Western Pacific Railroad, said line having been definitely located on January 30th, 1865, and that said Western Pacific Railroad Company had, prior

to the commencement of this action, conveyed to said defendant in error all its right and title to said lot.

Trans., page 11.

As the conclusion of law from the facts above substantially stated, the said District Court found and decided that the now plaintiff in error had "*shown no equities which entitled him to the relief sought in his cross-bill*" and ordered the same dismissed.

Trans., page 11.

The question intended to be presented to this Court for its review, is whether, upon the facts, above substantially stated, all of which depend upon *Federal* laws for their effect, the above mentioned decision of said District Court, affirmed by the Supreme Court of California, is correct.

We submit that it is not, and, briefly for the following reasons:

1st. That the facts show the acquisition by said plaintiff in error, of a valid pre-emption claim and right to said land in dispute, situated in said Township 6 south, Range 1 west, Mt. Diablo base and meridian, *prior* to any claim of right acquired by said Western Pacific Railroad Company, and a right within the *express exceptions* contained in said railroad grant.

12 U. S. Stats., p. 492, § 3.
13 U. S. Stats., p. 358, § 4.
13 U. S. Stats., p. 504, § 2.

Cunningham *vs.* Ashley, 14 How. U. S., 382–389.

Pre-emption claim of Wm. McHenry, Vol. 1, Western Land Owner, p. 53.

2d. That the inclusion of a small portion of said pre-emption claim, to wit: that lying within Township 7 south, of Range 1 west, within the corporate limits of the town of Santa Clara, by the extension of those limits made on March 31st, 1866, and the subsequent relinquishment and grant, by the United States, of the title to said *portion*, to the corporate authorities of said town, and their conveyance of such title to said plaintiff in error, could not and did not have the effect to extinguish, destroy, or *in any manner prejudice* the right of said plaintiff in error to the remainder of said pre-emption claim which was situated in Township 6 south, of Range 1 west, including the *land now in controversy.*

O'Brien *vs.* Perry, 1 Black., 137–139.

Stark *vs.* Starrs, 6 Wallace, 413–419.

3d. That the laws of the United States, as correctly construed by the Land Department thereof, allow a qualified pre-emptor to locate his pre-emption claim upon land *lying in two adjoining townships.*

Pre-emption claim of Wm. McHenry, Vol. 1, Western Land Owner. page 53, (July, 1874.)

4th. That the title to the *portion* of his pre-emption claim which was situated in Township 7 south, having been vested, by Act of Congress, in the corporate authorities of the town of Santa Clara, and by them conveyed to said plaintiff in error, no declaratory statement of any kind whatsoever was necessary to secure to him *that portion* of said claim.

5th. That the decision of the United States Land Officers in awarding said land in dispute, (with the other land claimed in said Township 6,) to said Western Pacific Railroad Company, is not *conclusive* of said plaintiff in error's right thereto, and does not preclude an investigation of such right and decision thereon *by a Court of equity.* The U. S. Land Officers had not the *power* nor *jurisdiction,* by any such "finding" or "decision" to bind or conclude the rights of parties claiming, not as *adverse pre-emptors,* but under *different Acts* of Congress.

Megerle *vs.* Ashe, 33 Cal., 89–90.
Johnson *vs.* Towsley, 13 Wallace, 72.
Lindsey *vs.* Haws, 2 Black., 554.
Minnesota *vs.* Batchelder, 1 Wallace, 109.
Sampson *vs.* Smiley, 13 Wallace, 91.
Webster *vs.* Marshall, 19 Cal. Rep., 447.
Lestrade *vs.* Barth, 19 Cal. Rep., 660.
Arguello *vs.* Edinger, 10 Cal. Rep., 160.
O'Brian *vs.* Perry, 1 Black., 132–139.
Stoddard *vs.* Chambers, 2 How., 283–318.
Lytle *vs.* State of Arkansas, 22 How., 190.
Garland *vs.* Wynn, 20 How., 6.

6th. That, upon such investigation by a *Court of Equity*, the questions of fact are, *not* what said *Land Officers found* and decided upon the evidence which was adduced before them, but what is the *actual truth* of the matter as legally and *judicially ascertained by such Court of Equity*.

Warren *vs.* Van Brunt, 19 Wallace, 653.

7th. That whatever lawful use may, upon such trial in a Court of Equity, be made of such *findings* and decision of such Land Officers, they can not prevail against or overcome the *truth* as ascertained and *found* by such Court of Equity.

Warren *vs.* Van Brunt, 19 Wallace, 653.

8th. That if the "finding," and "decision" of said "Commissioners of the General Land Office that said *premises in controversy* were *within the corporate limits* of the town of Santa Clara," were to be taken and held as conclusive, *that fact* together with the further finding that, on March 1st, 1867, the United States *granted* all the land within such limits to the corporate authorities thereof, and that, on December 20th, 1867, such corporate authorities conveyed the portion of said pre-emption claim *so situated*, to said plaintiff in error, would establish the *title* of the plaintiff in error to said "premises in controversy."

9th. The "finding" by the *Commissioner* that said plaintiff in error, "after filing upon said land, had sold and disposed of a portion of said tract," etc., may, so far as appears, have related to the

portion thereof conveyed to him by the corporate authorities of the town of Santa Clara, and after such conveyance, but, at any rate, has no conclusive force as against the express *finding of the court* herein, "that said defendant Ferguson, (plaintiff in error herein) made *no* agreement or *contract of any character whatever* with any person by which the title he proposed to secure and obtain from the United States Government, should inure in whole or in part to any person other than the said Ferguson himself."

We submit that the "conclusion of law" of the court below was wholly erroneous and unwarranted by its findings of fact, and that its judgment, consequently, and that of the Supreme Court of California affirming it, ought to be reversed by this court, which we pray may be done.

W. W. Foote

Of Counsel for Plaintiff in